92-623

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

RMI TITANIUM COMPANY,
Petitioner,

vs.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 7-629, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS FOR ASHTABULA COUNTY

PETITION FOR A WRIT OF CERTIORARI

THOMAS H. BARNARD
Counsel of Record
DAVID J. SOMRAK
STEPHEN C. SUTTON
DUVIN, CAHN & BARNARD
Erieview Tower—20th Floor
1301 East Ninth Street
Cleveland, Ohio 44114
(216) 696-7600
Attorneys for Petitioner
RMI Titanium Company

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

Whether a state court violates the supremacy clause of Article VI of the United States Constitution by failing to apply controlling federal common law in reviewing a labor arbitration award and by entering judgment on the merits of the underlying grievance rather than simply vacating the award as mandated by federal law?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner RMI Titanium Company was the defendant below in the trial court, and the appellee in the Ohio Court of Appeals. RMI was the appellant in the Supreme Court of Ohio.

Respondents, the Oil Chemical and Atomic Workers International Union, Local 7-629 and Wallace Heinonen, Jr., were the plaintiffs below in the trial court and were the appellants in the Ohio Court of Appeals. They were the appellees in the Supreme Court of Ohio.

STATEMENT PURSUANT TO RULE 29.1

RMI Titanium Company is a publicly held corporation traded on the New York Stock Exchange. Approximately one-half (1/2) of RMI's common stock is owned by USX Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

STATEMENT PURSUANT TO RULE 29.1 ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 9

The Ohio Court of Appeals Failed To Adhere To The Constitutional Mandate That Federal Law Controls Disputes Involving Private Sector Collective Bargaining Agreements By Applying State Law In Reviewing A Private Sector Labor Arbitration Award, And By Entering A Decision On The Merits Of The Underlying Grievance 9

CONCLUSION 15

APPENDIX:

Judgment Entry of the Supreme Court of Ohio Overruling Motion to Certify the Record (July 15, 1992) A1

Judgment Entry of the Court of Appeals for Ashtabula County Appealed From (March 2, 1992) A2

Judgment Entry of the Ohio Court of Appeals for Ashtabula County Affirming Lower Court's Decision that RMI was not in Contempt of Court (March 2, 1992) A3

Opinion of the Court of Appeals for Ashtabula County Affirming Lower Court's Decision that RMI was not in Contempt of Court (March 2, 1992) A4

Judgment Entry of the Ashtabula County Court of Common Pleas Holding that RMI was not in Contempt of Court (March 21, 1991) A8

Judgment Entry of the Supreme Court of Ohio Overruling Motion to Certify the Record (January 20, 1988) A13

Judgment Entry of the Ohio Court of Appeals for Ashtabula County Vacating Arbitration Award (October 1, 1987) A14

Opinion of the Ohio Court of Appeals for Ashtabula County Vacating Arbitration Award (October 1, 1987) A15

TABLE OF AUTHORITIES

Cases

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 10

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 12

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 11

Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962) 10

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 9,10

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987) 12,13,14

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960) 10,11,13

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 11,13

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 11,13

W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, 461 U.S. 757 (1983).. 12

Constitutional Provisions and Statute

U.S. Const., Article VI. 4,14

Labor Management Relations Act, Section 301, 29 U.S.C. §185 4,10,13

Treatises

The Applicability of State Arbitration Statutes To Proceedings Subject To LMRA Section 301, 27 Ohio St. L.J. 692 (1966). 10

No. _____

IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS FOR ASHTABULA COUNTY

PETITION FOR A WRIT OF CERTIORARI

RMI Titanium Company petitions for a writ of certiorari to review the judgment of the Ohio Court of Appeals for Ashtabula County issued March 2, 1992.

OPINIONS BELOW

The March 2, 1992 decision of the Ohio Court of Appeals is unpublished, but appears in Petitioner's Appendix. The Ohio Supreme Court, in an unpublished order, refused review of the Court of Appeals' decision on July 15, 1992. Its order appears in the Appendix.

JURISDICTION

The Judgment of the Supreme Court of Ohio refusing review of the Ohio Court of Appeals' decision was entered on July 15, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the United States Constitution provides as follows:

> ARTICLE VI. All Debts contracted and Engagements entered into, before Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the Several States, shall be bound by Oath or Affirmation, to support this Constitution: but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, provides as follows:

> §185. Suits by and against labor organizations
>
> (a) Venue, amount, and citizenship
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against the assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

To service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

The long and complex history of this case began on April 20, 1983 when an arbitrator ruled that petitioner RMI Titanium Company ("RMI") discharged employee Wallace Heinonen ("Heinonen") for just cause under the terms of the collective bargaining agreement between RMI and respondent Oil, Chemical and Atomic Workers International Union, Local 7-629 (the "Union"). The arbitrator found that Heinonen had failed to return to work following a leave of absence for an industrial injury, and thereby forfeited his employment rights under the collective bargaining agreement.

The arbitrator's award was appealed to the Ohio Court of Common Pleas for Ashtabula County, which affirmed the award. A subsequent appeal was taken to the Ohio Court of Appeals for Ashtabula County. On October 1, 1987, the Court of Appeals reversed the judgment of the Court of Common Pleas, thus effectively vacating the arbitrator's award.

RMI sought review of the Court of Appeals' October 1, 1987 decision by the Supreme Court of Ohio. However, the Supreme Court of Ohio denied review of the Court of Appeals' decision on March 16, 1988.

Following the Supreme Court of Ohio's refusal to review the Court of Appeals' vacation of the arbitration award, nothing happened for nearly two and one-half (2½) years. During that time, RMI indicated to the Union that its position remained that Heinonen had been discharged for just and proper cause and that it was willing to re-arbitrate the issue. The Union and Heinonen, in contrast, believed that the Ashtabula County Court of Appeals' reversal of the Ashtabula County Court of Common Pleas' decision somehow

resulted in an award on the merits of the grievance in their favor. That is, they asserted that the arbitration award was not merely vacated, but that Heinonen was entitled to reinstatement, back pay, and other lost benefits. However, despite their contention, Heinonen and the Union did nothing to challenge RMI's position until December 12, 1990.

On that date, Heinonen moved the Ashtabula County Court of Common Pleas to hold RMI in contempt for failing to comply with the Ashtabula County Court of Appeals' October 1, 1987 decision, contending that RMI was obligated to reinstate him with backpay and full restoration of seniority and other benefits. The Court of Common Pleas denied Heinonen's motion holding that the Court of Appeals' October 1, 1987 decision went no further than vacating the arbitration award.

Heinonen then appealed that decision to the Ashtabula County Court of Appeals. The Court of Appeals upheld the Common Pleas Court's finding that RMI was not in contempt of its October 1, 1987 decision "since there was no clear order which appellee [RMI] refused to obey."

Incredibly, on March 2, 1992, the same day it held that RMI was not in contempt, the Ashtabula County Court of Appeals attempted to rewrite history. Without citing any authority allowing it to do so or allowing RMI to be heard on the matter, the Ashtabula County Court of Appeals vacated its October 1, 1987 decision and entered judgment on the merits of Heinonen's grievance. Substituting its own interpretation of the collective bargaining agreement between RMI and the Union for that of an arbitrator, the Court purported to resolve the underlying grievance as follows:

> We hereby vacate our September 30, 1987 [sic] mandate in this matter and reenter judgment reversing the judgment of the trial court and entering judgment in favor of appellant. We also enter judgment in appellant's favor on the issues of reinstatement, seniority, backpay and other benefits prayed for by appellant; therefore, this case is reversed and remanded to the common pleas court for assignment of this matter to arbitration per the terms of the collective bargaining agreement to determine the specific terms of reinstatement, which include back pay, seniority and other benefits contained in appellant's prayer for relief.

RMI timely appealed this decision to the Supreme Court of Ohio by filing a motion to certify the record. RMI asserted, among other things, that the Court of Appeals had no authority under controlling federal labor law other than simply to vacate the arbitrator's award, which it had already done in the October 1, 1987 decision. The Supreme Court of Ohio refused to entertain RMI's appeal on July 15, 1992.

REASONS FOR GRANTING THE WRIT

THE OHIO COURT OF APPEALS FAILED TO ADHERE TO THE CONSTITUTIONAL MANDATE THAT FEDERAL LAW CONTROLS DISPUTES INVOLVING PRIVATE SECTOR COLLECTIVE BARGAINING AGREEMENTS BY APPLYING STATE LAW IN REVIEWING A PRIVATE SECTOR LABOR ARBITRATION AWARD, AND BY ENTERING A DECISION ON THE MERITS OF THE UNDERLYING GRIEVANCE.

In time honored precedent, this Court has repeatedly emphasized the limited role played by courts in reviewing labor arbitration awards. Consistently, this Court has mandated that the judiciary leave the consideration of the merits of the underlying grievance to the arbitrator. In this case, the Ohio Court of Appeals failed to apply controlling federal law and purported to enter final judgment on the merits of the underlying grievance in this case. This result was apparently sanctioned by the Supreme Court of Ohio when it refused to hear RMI's motion to certify the record. The Ohio courts' failure to recognize the preeminent role of federal law in private sector labor law justifies review, and reversal, of the Court of Appeals' decision by this Court.

Initially, there is no question that federal common law is controlling precedent in this action, notwithstanding that Heinonen and the Union sought to vacate the arbitration award in state court by procedures established in the Ohio Revised Code. This Court made clear long ago in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), that federal law would be controlling in actions involving private sector labor contracts like the one in this case:

> Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy. *Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.*

Id., 353 U.S. at 456 (emphasis added); *See also Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) ("The dimensions of §301 require the conclusion that substantive principles of labor law must be paramount in the area covered by the statute.") Indeed, as one early commentator observed "[a]ny action, however, in the state courts involving arbitration between an employer and a union representing employees in an industry affecting interstate commerce is controlled by the Labor Management Relations Act, namely section 301." Comment, *The Applicability of State Arbitration Statutes To Proceedings Subject To LMRA Section 301*, 27 Ohio St. L.J. 692, 694 (1966). Consequently, the Ashtabula County Court of Appeals was duty bound to apply federal law in this case.

The enactment of Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185(a), served as a "congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). Faithful to this mandate, this Court defined the scope of judicial review of labor arbitration awards in three seminal decisions collectively referred to as the Steelworkers Trilogy—*United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564

(1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

In *Enterprise Wheel and Car Corp.*, the Court, through Justice Douglas, succinctly instructed that the merits of the underlying grievance was properly left to the arbitrator, not the courts: "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Id.*, 363 U.S. at 596. Likewise, in *American Manufacturing Co.*, the Court again emphasized that the courts should not substitute their opinion for that of the arbitrator:

> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.
>
> . . .
>
> When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under the regime is entrusted to the arbitration tribunal.

Id., 363 U.S. at 568-69.

In its decisions following the Steelworkers Trilogy, this Court has repeatedly recognized the principle that the courts should not enter judgment on the merits of the underlying grievance when reviewing a labor arbitration award. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 411 (1988) ("Today's decision

should make clear that interpretation of collective bargaining agreements remains firmly in the arbitral realm. . . ."); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) ("The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."); *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757, 764 (1983) ("Under well-established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one.").

Indeed, in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), this Court specifically defined the limits of judicial review of arbitration awards as encompassing only a decision to vacate or enforce the award:

> Even in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, *as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective bargaining agreement. Instead, the court should simply vacate the award, this leaving open the possibility of further proceedings is they are permitted under the terms of the agreement.*

Id., 484 U.S. at 40 n.10 (emphasis supplied). Thus, following this Court's decision in *Misco*, it is absolutely clear that in reviewing an arbitration award, a

court's authority does not extend to entering judgment on the merits of the underlying grievance.

In this case, the Ohio Court of Appeals for Ashtabula County's October 1, 1987 decision simply vacated the arbitrator's award and was in compliance with this Court's precedent. The Ashtabula County Court of Appeals' March 2, 1992 decision, however, went further. In that decision, the Court entered judgment on the merits of the grievance, specifically holding that Heinonen be reinstated with backpay and other benefits.

The Court of Appeals' March 2, 1992 decision must not stand. In that decision, the Court of Appeals clearly circumvented this Court's decisions in the *Steelworkers Trilogy* and *Misco* by usurping the function of the arbitrator and effectually holding that Heinonen was not discharged for cause under the collective bargaining agreement. Therefore, this case provides this Court with an opportunity not only to correct the Ohio court's direct contravention of this Court's precedent, but to take *Misco* one step further by unequivocally defining the proper scope of a court's order vacating an arbitration award. By accepting jurisdiction over this action, this Court can eliminate any doubt that, in vacating an arbitration award, a court is limited to simply remanding the action for *de novo* arbitration pursuant to the terms of the collective bargaining agreement, and that a court may not, under any circumstances, substitute its judgment on the merits of the grievance as was done in this case.

Traditionally, this Court has not hesitated to fulfill the Congressional mandate embodied in Section 301 of the LMRA to develop and fashion a uniform body of federal common law to be applied in disputes arising out of private sector collective bargaining agreements. This

Congressional mandate, along with the very terms and spirit of the supremacy clause in Article VI of the United States Constitution, will be rendered meaningless if the Ashtabula County Court of Appeals' decision in this case is allowed to stand. Additionally, if the Court of Appeals' decision is not overturned, RMI will be deprived of its right under the collective bargaining agreement to have an arbitrator interpret the merits of Heinonen's grievance. Accordingly, RMI respectfully requests this Court accept this case for full review in order to further define its holding in *Misco* by clarifying the proper scope of a court order vacating an arbitration award, and to correct the Ohio Court's clear arrogation to itself of authority it does not have under law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS H. BARNARD
Counsel of Record
DAVID J. SOMRAK
STEPHEN C. SUTTON
DUVIN, CAHN & BARNARD
Erieview Tower—20th Floor
1301 East Ninth Street
Cleveland, Ohio 44114
(216) 696-7600
Attorneys for Petitioner
RMI Titanium Company

APPENDIX

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY AND DISMISSING APPEAL

(Dated July 15, 1992)

THE SUPREME COURT OF OHIO
Columbus

OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION 7-629, *et al.*,
Appellees,

v.

RMI COMPANY,
Appellant.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Ashtabula County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion fee, $40,00, paid by Duvin, Cahn & Barnard.

/s/ THOMAS J. MOYER
Chief Justice

JUDGMENT ENTRY OF THE OHIO COURT OF APPEALS FOR ASHTABULA COUNTY APPEALED FROM

(Dated March 2, 1992)

Case No. 1294

IN THE OHIO COURT OF APPEALS
FOR ASHTABULA COUNTY

OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION AFL-CIO, 7-629 *et al.*,
Plaintiffs-Appellees,

v.

RMI COMPANY,
Defendant-Appellant.

JUDGMENT ENTRY

We hereby vacate our September 30, 1987 mandate in this matter and reenter judgment reversing the judgment of the trial court and entering judgment in favor of appellant. We also enter judgment in appellant's favor on the issues of reinstatement, seniority, back pay and other benefits prayed for by appellant; therefore, this case is reversed and remanded to the common pleas court for assignment of this matter to arbitration per the terms of the collective bargaining agreement to determine the specific terms of reinstatement, which include back pay, seniority and other benefits contained in appellant's prayer for relief. It is so ordered.

Clerk of Courts is ordered to strike the mandate of September 30, 1987 from the record in this matter.

It is further ordered that the vacated entry is replaced with this judgment entry.

/s/ JUDITH CHRISTLEY
Judge Judith A. Christley
For The Court

JUDGMENT ENTRY OF THE OHIO COURT OF APPEALS FOR ASHTABULA COUNTY AFFIRMING LOWER COURT'S DECISION THAT RMI WAS NOT IN CONTEMPT OF COURT

(Dated March 2, 1992)

Case No. 1294

IN THE OHIO COURT OF APPEALS
FOR ASHTABULA COUNTY

OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION AFL-CIO 7-629, *et al.*,
Plaintiffs-Appellants,

v.

RMI COMPANY,
Defendant-Appellee.

JUDGMENT ENTRY

For the reasons stated in the Opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

/s/ JUDITH CHRISTLEY
Judge Judith A. Christley
For The Court

OPINION OF THE OHIO COURT OF APPEALS FOR ASHTABULA COUNTY AFFIRMING LOWER COURT'S DECISION THAT RMI WAS NOT IN CONTEMPT OF COURT

(Dated March 2, 1992)

Case No. 1294

IN THE OHIO COURT OF APPEALS
FOR ASHTABULA COUNTY

OIL CHEMICAL & ATOMIC WORKERS
INTERNATONAL UNION AFL-CIO, 7-629, *et al.*,
Plaintiffs-Appellants,

v.

RMI COMPANY,
Defendant-Appellee.

OPINION

CHRISTLEY, *J.*

Appellant, Wallace D. Heinonen, Jr., is appealing a judgment entry in which appellee, RMI Company, was found not be to in contempt of a judgment rendered by this court on October 1, 1987.

A capsulized review of the facts leading to this appeal is as follows. Appellant Heinonen sustained a job related injury on January 27, 1982. As a result, he was unable to work. On June 25, 1982, the company doctor examined appellant Heinonen. After this examination, appellee ordered appellant Heinonen to report back to work for light duty on June 29, 1982. On June 28, 1982,

appellant Heinonen informed appellee that he would not report back to work since he had not been released by his personal physician.

Appellant Heinonen did not report back for work. On July 12, 1982, appellee notified appellant Heinonen that his employment had been terminated as of July 1, 1982. Subsequently, appellant Heinonen supplied appellee with several letters from doctors indicating that he had not been released to return to work.

Pursuant to appellant's union collective bargaining agreement, he filed his grievance which resulted in an arbitration hearing on April 20, 1983. The arbitration decision upheld appellant Heinonen's discharge. In that decision, the arbitrator relied on the determination that appellant Heinonen was on a leave of absence.

On July 14, 1983, appellant Heinonen, along with his union, filed with the Ashtabula County Court of Common Pleas an application and motion for vacation of the arbitration award. Subsequently, the parties filed motions for summary judgment. The court of common pleas granted appellee's motion for summary judgment, affirmed the arbitration award and overruled appellant's motion for summary judgment.

Appellant Heinonen and his union appealed the trial court's judgment. On September 30, 1987, this court rendered its opinion. *Oil Chemical and Atomic Workers International Union AFL-CIO, Local 7-629 v. RMI Company* (Sept. 30, 1987), Ashtabula App. No. 1294, unreported. In that opinion, this court reversed the court of common pleas, thus vacating the arbitration award. The opinion stated that the evidence did not support the arbitrator's finding that appellant Heinonen was on a leave of absence. Moreover, the opinion further stated:

> "Public policy would require reversal of a decision which would allow an employer to force a worker to choose between going back to work or terminating without first complying with R.C. 4123.56 *when the dispute is over the employee's ability to return to work*." *Id.* at 11. (Emphasis in original.)

Although the court of common pleas' judgment was reversed, this court failed to remand the case for further proceedings.

Appellee indicated it attempted to appeal the September 30, 1987 decision to the Ohio Supreme Court, but the review was denied. Although the attempted appeal is undisputed, the docket lacks any indication such an appeal was undertaken.

In the court of common pleas court's judgment entry denying the motion for contempt, it also stated that appellee and appellant's union exchanged correspondence in February and March of 1988 regarding the interpretation of the September 30, 1987 decision.

Finally, on December 12, 1990, appellant Heinonen filed a motion for contempt against appellee for failure and refusal to reinstate him with restoration of all seniority and lost benefits.

After a hearing and briefing on the matter, the court of common pleas overruled the motion for contempt since it did not believe that the September 30, 1987 opinion was clear that it went beyond vacating the arbitration award, or that it required appellee to reinstate the appellant Heinonen to his former position with all seniority, back pay and other benefits.

Appellant Heinonen is now appealing the judgment entry concerning the motion for contempt raising two assignments of error:

"1. A court has the power to vacate or modify an arbitration award and to enter a final judgment determining the issues between the parties.

2. A trial court errs (*sic*) in refusing to cite a party for contempt, where that party refuses to comply with a final and binding judgment against it."

As to both of the stated assignments, this court finds no error and thus affirms as to each. "Contempt of court is defined as disobedience of an order of a court." *Windham Bank v. Tomaszcyk* (1971), 27 Ohio St.2d 55, paragraph one of syllabus. This court agrees with the trial court and appellee that there can be no finding of contempt since there was no clear order which appellee refused to obey. Therefore, both of appellant's assignments are without merit.

This is obviously an unsatisfactory result which requires us to revisit and take further action on the original case and judgment entry, in Case No. 1294, *Oil Chemical and Atomic Workers International Union AFL-CIO, Local 7-629, supra.*

However, as to the matter immediately before us in the instant appeal, we affirm the trial court's judgment concerning the appeal on contempt.

/s/ JUDITH CHRISTLEY
Judge Judith A. Christley

JUDGMENT ENTRY OF THE ASHTABULA COUNTY COURT OF COMMON PLEAS HOLDING THAT RMI WAS NOT IN CONTEMPT OF COURT

(Dated March 21, 1992)

Case No. 78355

IN THE COURT OF COMMON PLEAS
FOR ASHTABULA COUNTY

OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION AFL-CIO, 7-629, *et al.*,
Plaintiffs,

v.

RMI COMPANY,
Defendant.

JUDGMENT ENTRY

This cause came on for hearing on January 14, 1991, upon the Motion of plaintiff, Wallace Heinonen, for contempt against defendant, RMI Company, filed herein on December 12, 1990. Plaintiff was represented by Jack Schulman and Walter E. Thayer. Defendant was represented by David J. Somrak. The Court heard the arguments of counsel, after which plaintiff was granted an additional fourteen (14) days within which to file a written reply to defendant's Brief in Opposition. Plaintiff's reply brief has been filed and the matter is submitted for decision.

The record indicates that the plaintiff was employed by the defendant, RMI Company, and that on January 27, 1982, he sustained a job related injury. As a result of the injury, the plaintiff was off work, and remained off work until his discharge by defendant. The company doctor examined plaintiff on June 25, 1982, after which defendant ordered plaintiff to report to work for light duty on June 29, 1982. On June 28, 1982, plaintiff informed the defendant that he would not report for work, since he had not been released to work by his personal physician. Plaintiff did not report for work and on July 12, 1982, defendant notified plaintiff that his employment was terminated, effective July 1, 1982. Following the notice of termination, plaintiff provided three (3) separate doctors' letters indicating that he was not yet released to return to work. Plaintiff then filed his grievance pursuant to the parties' collective bargaining agreement. An arbitration hearing was held and on April 20, 1983, the arbitration decision was rendered, upholding plaintiff's discharge. On July 14, 1983, plaintiff filed his application for an order vacating the arbitration award. Plaintiff and defendant both filed Motions for Summary Judgment. On August 5, 1986, the Court entered its Judgment Granting defendant's Motion for Summary Judgment and affirming the arbitration award and overruling plaintiff's Motion for Summary Judgment and application to vacate the arbitration award. Plaintiff then appealed the Judgment of the Court to the Eleventh District Court of Appeals. On October 1, 1987, the Court of Appeals rendered its Judgment reversing the Trial Court. Apparently, the plaintiff sought, unsuccessfully, further review by the Supreme Court. In February and March of 1988, there was an exchange of correspondence between the defendant and an officer of plaintiff's union, regarding

interpretation of the Court of Appeals decision. The record does not disclose any further action by either side until plaintiff filed the Contempt Motion under consideration. It is stipulated by the parties that the defendant has not reemployed the Plaintiff, Wallace Heinonen, since his discharge in July, 1982.

In order for this Court to find defendant in contempt, it will be necessary to interpret the decision of the Eleventh District Court of Appeals to require reinstatement of the plaintiff to his former position, with back pay and benefits, and further, to find that the defendant has failed and refused to comply with that mandate.

The Judgment Entry entered by the Appellate Court clearly states "... the judgment of the trial court is reversed." The Opinion of the Appellate Court does conclude, "[t]he judgment of the trial court is therefore reversed and we enter final judgment for appellant." In the paragraph preceding this conclusion, the Court indicates that its determination is based upon a finding that the arbitrator exceeded his authority within R.C. 2711.10(D). Of course, R.C. §2711.10 is the provision requiring a Court to vacate an arbitration award, upon a finding of any of the grounds set forth therein. Nowhere does the opinion of the Court discuss R.C. §2711.11 which requires the Court to modify or correct an arbitration award, upon a finding of any of the conditions set forth therein.

While it is true that plaintiff's original Application and Motion for Vacation of Arbitration Award and Motion for Summary Judgment both sought judgment of the Court vacating the arbitration award *and* ordering the reinstatement of plaintiff with full back pay, rights,

and privileges, it is not as clear to this Court, as it apparently is to plaintiff's counsel, that this is the result and effect of the ruling of the Court of Appeals.

The parties' collective bargaining agreement provides for binding arbitration. In such case, the common law view is that a court is without jurisdiction to change or modify an arbitration award and must accept or reject the award in toto. *Industrial Electric Co. v. Meyers* (1949), 53 Abs. 426. Generally speaking, the substantive merits of the original arbitration award are not reviewable on appeal. *Lynch v. Halcomb* (1984), 16 Ohio App. 3d 223.

It is clear to this Court that its prior Judgment, entered August 5, 1986, is reversed. It is equally clear that the arbitration award of April 20, 1983, affirming plaintiff's dismissal is vacated. Beyond these conclusions, this Court does not have the temerity to hazard an opinion as to what further consequences the Appellate Court intended. Without the wherewithal to interpret the decision of the Court of Appeals as requested by plaintiff, the only issue for determination by this Court is whether the record and evidence herein will sustain a finding of contempt against the defendant. Since it is not clear that the Judgment of the Court of Appeals goes beyond vacating the arbitration award, or that it requires the defendant to reinstate the plaintiff to his former position with all seniority, back pay and other benefits, the Court holds that the record and evidence do not sustain a finding of contempt against the defendant.

IT IS THEREFORE THE ORDER AND JUDGMENT of the Court that the motion of plaintiff for an order holding the defendant, RMI Company, in contempt, is overruled.

Costs connected with the Motion for Contempt are assessed against plaintiff.

/s/ GARY L. YOST
Gary L. Yost, Judge

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY THE RECORD

(Dated January 20, 1988)

THE SUPREME COURT OF OHIO
Columbus

OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION AFL-CIO, LOCAL 7-629, *et al.*,
Appellees,

v.

RMI COMPANY, *et al.*,
Appellants.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Ashtabula County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Barton A. Bixenstine.

/s/ THOMAS J. MOYER
Chief Justice

JUDGMENT ENTRY OF THE OHIO COURT OF APPEALS FOR ASHTABULA COUNTY VACATING ARBITRATION AWARD

(Dated October 1, 1987)

Case No. 1294

IN THE OHIO COURT OF APPEALS
FOR ASHTABULA COUNTY

OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION AFL-CIO, 7-629, 7 WALLACE D. HEINONEN, JR., *et al.*,
Plaintiffs-Appellants,

v.

RMI COMPANY,
Defendant-Appellee.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court, the assignments of error are with merit, and it is the judgment and order of this court that the judgment of the trial court is reversed.

/s/ JUDITH CHRISTLEY
Judge Judith A. Christley
For The Court

OPINION OF THE OHIO COURT OF APPEALS FOR ASHTABULA COUNTY VACATING ARBITRATION AWARD

(Dated October 1, 1987)

Case No. 1294

IN THE OHIO COURT OF APPEALS
FOR ASHTABULA COUNTY

OIL CHEMICAL & ATOMIC WORKERS
INTERNATIONAL UNION AFL-CIO, 7-629,
7 WALLACE D. HEINONEN, JR., *et al.*,
Plaintiffs-Appellants,

v.

RMI COMPANY,
Defendant-Appellee.

OPINION

CHRISTLEY, *J.*

This is an appeal from a ruling of the Common Pleas Court which affirmed an arbitration award which upheld the dismissal of plaintiff-appellant Heinonen.

On January 27, 1982, appellant Wallace Heinonen, Jr. was injured on the job. Under the Bureau of Workers' Compensation he received temporary total disability from January 27, 1982 until February 27, 1983. During that interim, he was terminated by his employer on July 1, 1982 for failure to report to work after termination of a leave of absence.

The following communications and events transpired prior to appellant's termination:

On February 17, 1982, the Bureau of Workers' Compensation Form C-84 was submitted listing an estimated date of March 1, 1982 as the time when appellant could return to do light work.

No return to work order was issued by the company.

On April 1, 1982, a second Form C-84 form was sent to the company with an estimated date of return of May 6, 1982.

On April 6, 1982, appellant underwent surgery for decompression of the ulnar nerve.

No return to work order was issued by the company.

A third form C-84, dated June 2, 1982, was sent to the company with an estimated return date of June 30, 1982.

On June 25, 1982, the appellant saw the company physician at the request of the company after it had received the *estimated* date of June 30, 1982.

Apparently as a result of the company doctor's report, for the first time appellee ordered appellant to report to work for light duty on June 29, 1982.

On June 28, 1982, there was a phone call between appellant and a company representative at which time the appellant told the supervisor he would not report to work as scheduled because he did not feel he had been released to work by his own physician.

On June 29, 1982, appellant did not report for work.

On July 12, 1982, the appellee sent appellant a letter as follows:

> "This is to inform you that as of July 1, 1982, you are in violation of Section 8.21, paragraph (c) of the Labor Agreement which states:
>
> Section 8.21:
> Seniority Shall Be Lost And Employment Rights Terminated When:
>
> * * *
>
> (c) An employee fails to report to work on his first scheduled work day after termination of a leave of absence or vacation without proper notice to and authorization from the Company, except that failure to report is for just cause supported by the employee.'
>
> We have in our possession a statement from your doctor (Doctor Rehmatullah) that you may return to light work on June 30, 1982. You and I had a telephone conversation on June 28, 1982, during which I informed you that we had such work available and I told you that you were scheduled to report for such work. You informed me that you would not report and you have not. Unless you can justify your action by July 16, 1982, your employment will be terminated effective July 1, 1982."

In response, appellant's doctor supplied three separate statements to the company. On July 14th, he wrote:

> Patient to be seen on 7-26-82. Following evaluation at that time return to work determination will be made.

On July 15th, the physician wrote the following:

> To Whom It May Concern:
> Return to work date void if dated before 7-14-82. Determination will be made 7-26-82.

The third communication was dated July 16, 1982, and read as follows:

> It is my understanding that a confusion exists regarding the return to work date on my patient, Heinonen, Wallace D.
>
> Mr. Heinonen has been under my care since 1-27-82. Since then he has been temporarily totally disabled. He is not released for work.
>
> His next appointment to see me is on 7-26-82. [Underlining in original.]

In response, in a letter dated July 28th to the chairman of appellant union, the company gave the following reason for Heinonen's termination:

> The letter received by the Company on July 19, 1982 from his doctor has not yet satisfactorily explained why Mr. Heinonen did not report for the modified work made available to him by the Company.
>
> Since there has not been an explanation which justifies his action, Mr. Heinonen is considered to be terminated effective July 1, 1982, as was specified in the letter of July 12, 1982.

Subsequently, a grievance was filed by the union and the matter was submitted to binding arbitration under the terms of the union agreement.

The arbitrator upheld the discharge, finding in part that:

> "It must further be stated that this opinion is based solely upon the terms of the Agreement between the parties and the expectations arising from such Agreement. *While there is nothing in the opinion which is inconsistent with Workmen's Compensation procedures*, this decision is reached upon an analysis of facts pertinent to the grievant's return to work on June 30, 1982."

> "In the opinion of the arbitrator, the company had reasonably established June 29, 1982 as the final day of the grievant's *leave of absence*. Furthermore, this date had not been extended by proper notification and authorization of the company. Finally, the grievant failed to demonstrate that he had just cause not to report to work as scheduled. Thus, the company properly terminated the grievant upon his failure to report to work on June 30, 1982."
> [Emphasis added]

Appellants then filed their application and motion for vacation of arbitration award in the common pleas court. Appellee filed its answer along with its application to reduce the arbitration award to judgment. Appellants thereafter filed an answer to appellee's application.

Each party filed a motion for summary judgment and the trial court found for appellee, affirming the arbitration award.

At oral argument on appeal the issue was raised as to whether this matter was properly submitted for arbitration under the grievance procedures found in the collective bargaining agreement.

In light of *Balyint v. Arkansas Best Freight System, Inc.* (1985), 18 Ohio St.3d 126, the choice was appellants.

> "Thus, to the extent that appellees' present common-law action overlaps a claim under R.C. 4123.90, appellees are free to select the remedy best calculated to afford the greatest recovery."

It must be noted that appellant's cause of action for wrongful discharge is ancillary to the merits of appellant's Workers' Compensation claim. Therefore, it is clear that the utilization of the collective bargaining provision for binding arbitration in this matter is justified under the facts of this case.

For their first two assignments of error, appellants state:

> The Court of Common Pleas erred in holding that the award of the arbitrator which sustained the discharge of plaintiff Heinonen, based upon an inapplicable provision of the collective bargaining agreement, should not be vacated.
>
> The Court of Common Pleas erred in holding that the award of the arbitrator, which sustained the discharge of plaintiff Heinonen for not reporting to work when he was, in fact, temporarily and totally disabled, should not be vacated.

These two assignments of error are essentially the same, therefore they will be treated together. Both have merit. The finding that appellant Heinonen was on a *leave of absence* is critical to appellee's case because that status was the basis for appellant's discharge under Section 8.21 of the Collective Bargaining Agreement.

The arbitrator states in his decision "the point of contention between the parties is whether or not the grievant was properly scheduled to return to work by June 30, 1982. Underlining this issue are two supplemental questions. First, whether or not the *leave of absence* granted to the grievant had been extended through proper notice and to authorization from the company. Second, whether the grievant had demonstrated just cause not to report to work. [Emphasis added]

Appellants correctly argue that the phrase "leave of absence" as used in Section 8.21 can not be applied to "any absence" as ruled by the arbitrator. Appellant's position is supported by the fact that a "leave of absence" is specifically defined in Section 17.1 of the Collective Bargaining Agreement.

Section 17.1 of the Collective Bargaining Agreement reads as follows:

> "An employee, upon written application *on a form prescribed by the company* may be granted a *leave of absence* without pay and without loss of seniority for a period not exceeding three (3) months, where production requirements permit, or upon good cause being shown. A leave of absence *extension may be granted in writing* upon written request where deemed justifiable***
> The *Union will be given written notification* of all leaves of absence granted in accordance with this section."
> [Emphasis added]

Section 8.21 Seniority Shall Be Lost And Employment Rights Terminated when:

> "(c) An employee fails to report to work on his first scheduled work day after termination of a *leave of absence* or vacation without proper notice to and authorization from the company, except that failure to report is for just cause supported by the employee."
> [Emphasis added]

Throughout the Collective Bargaining Agreement there are numerous references to the various kinds of absences which may be incurred by an employee. The absences are never referred to collectively as "leave of absence," but are always designated by a specific title. For example:

Section 5.5 sets out the following distinction between the terms relating to absences: "***an employee returning from an *extended illness* or *injury* of more than two weeks, ***and an employee returning from a *leave of absence* of thirty (30) calendar days or more." [Emphasis added]

Section 7.8 speaks of "an employee absent because of being on *vacation* or *illness* or *injury compensable under the Workmen's Compensation Act* of Ohio will be considered as having had *earnings* during each week's absence for the purpose of this section." [Emphasis Added] Under Section 17.1, a "leave of absence" is *without* pay.

Under Section 8.22(B) entitled "Seniority", there is a differentiation as follows; "An employee who has accepted a temporary assignment to a job outside of the bargaining unit to provide coverage for *illness, injury, leave of absence* or *vacation relief* of a permanent salaried employee shall retain and accumulate plant, department and group seniority*** [Emphasis added]

It is clear that throughout the Collective Bargaining Agreement there is a clear distinction drawn between the terms "leave of absence," "illness," "injury" and "leave due to compensable injury under the Workers' Compensation Plan," etc.

Therefore the arbitrator's conclusion and the basis of his finding that leave of absence under Section 17.1 can be applied to *any absence* is totally contrary to the content and intent of the Collective Bargaining Agreement which the arbitrator states is the basis of his decision.

It is true that the role of a reviewing court in claims involving the findings of binding arbitration is extremely limited. R.C. 2711.20 limits judicial review of arbitration to claims of fraud, corruption, miconduct, and imperfect award, or that the arbitrator exceeded his authority.

Appellate review of arbitration proceedings is confined to an evaluation of the order issued by the Court of Common Pleas pursuant to R.C. 2711. *Lynch v.*

Halcomb (1984), 16 Ohio App.3d 223; *Lockhart v. American Res. Ins. Co.* (1981), 2 Ohio App.3d 99, the substantive merits of the original arbitration award are not reviewable on appeal absent evidence of *material mistakes* or extensive impropriety. *Id.* [Emphasis added]

However, an arbitrator's award must draw its essence from the Collective Bargaining Agreement. *Graise v. Firestone Tire and Rubber Co.* (1979), 65 Ohio App.2d 119.

An arbitrator who relies upon an inapplicable provision of a Collective Bargaining Agreement exceeds his authority. *Timken Company v. Local Union No. 1123 United Steel Workers of America A.F.L./C.I.O.* (C.A. 6, 1973), 482 F.2d 1012.

Even if there were some way to construe "leave of absence" to include appellant Heinonen's situation, the record does not demonstrate that any of the procedures of Section 17.1 were followed. The specified form wasn't used, there was no written application, no grant of such a leave and no notice to the union. The record does not demonstrate any evidence to support the arbitrator's theory that a leave of absence was even sought, obtained or granted in appellant's case.

Finally, the facts are clear and undisputed in the arbitrator's award that the real issue was whether appellant was able to return to work or whether he was still under temporary total disability.

> R.C. 4123.56 provides that "in the case of an employer who has elected to pay compensation directly, payment shall be for a duration based upon the medical reports of the *attending* physician.*** *If the employer disputes the attending physician's report,* payments may be terminated *only upon application and hearing by a district hearing officer.*" [Emphasis added]

Public policy would require a reversal of a decision which would allow an employer to force a worker to choose between going back to work or terminating without first complying with R.C. 4123.56 *when the dispute is over the employee's ability to return to work.*

This court cannot accept the concept that an arbitrator's award which states that it is not inconsistent with the Workers' Compensation Law can result in a decision contrary to the public policy and purpose of that law.

Appellants' third assignment of error, alleges that:

> The Court of Common Pleas erred in denying his motion for summary judgment and granting appellee's motion for summary judgment.

Nowhere in appellants' brief is this issue argued. App. R. 16 requires this argument of the brief to contain "the contentions of the appellant with respect to the assignments of error presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."

This court will not disagree with appellee's contention that arbitration findings must be granted great deference by the court. However, in this instance the court feels that the arbitrator exceeded his authority within the meaning of R.C. 2711.10(D) by ignoring both the specific language of the contract as well as the public policy and purpose of the Workers' Compensation statute, in particular R.C. 4123.56.

The judgment of the trial court is therefore reversed and we enter final judgment for appellant.

/s/ JUDITH A. CHRISTLEY
Judge Judith A. Christley